JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

A

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd

B

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-24–05 OF 2013(M)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), AHMAD MAAROP AND ZALEHA ZAHARI FCJJ
C
22 MAY 2014

Civil Procedure — Summary judgment — Banking — Bank sued advocates and solicitors for breach of terms, conditions and warranties of appointment and
D *negligence in performance — Advocates and solicitors did not file affidavit in reply or submission — Application for summary judgment by bank — Rules of the High Court 1980 O 14 — Final judgment entered against advocates and solicitors — Whether summary judgment may be entered for amount as prayed for in statement of claim and as affirmed in affidavit in support — Whether*
E *assessment necessary*

This was an appeal against the Court of Appeal's decision in allowing the respondent's ('the plaintiff') appeal against the decision of the High Court, in favour of the appellants ('the defendants'). The plaintiff was a bank while the
F defendants were advocates and solicitors appointed by the defendants to commence legal proceedings to recover outstanding amounts from ODA Holdings (M) Development Corp Sdn Bhd ('ODA'). The defendants then successfully obtained judgment in default of defence against ODA at the High Court. Nearly ten years after the judgments were obtained, the plaintiff
G instructed the defendants to enforce the judgments against ODA and the defendants proceeded to issue notice of demand for payment but ODA ignored the notice of demand, causing the defendants to present a winding up petition ('the petition') against the former. In opposing the petition, ODA argued that the plaintiff had claimed for an outstanding amount which
H included arrears of interest accrued more than six years. The High Court accepted the objection and dismissed the petition with costs. The plaintiff then instructed the defendants to re-commence fresh winding proceedings against ODA but the defendants advised the plaintiff that they were unable to issue a fresh statutory demand nor take any action to enforce the judgment as it was
I statute-barred under s 6(3) of the Limitation Act 1953. In the High Court, the plaintiff sued the defendants for breach of the terms, conditions and warranties of their appointment and negligence in the performance of their services. The plaintiff applied for leave to enter summary judgment against the defendants pursuant to O 14 ('the O 14 application') of the Rules of the High Court 1980

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

('RHC'). The deputy registrar allowed the O 14 application and entered final judgment as there was no affidavit in reply or submission by the defendants. The defendants appealed against the deputy registrar's decison and the appeal was allowed. Aggrieved the plaintiff appealed against the High Court's decision to the Court of Appeal on the issue of quantum and the appeal was allowed. Hence, the present appeal. The principal issue in this appeal is whether a summary judgment may be entered for the amount as prayed for in the statement of claim and as affirmed in the affidavit in support without the need for any assessment.

Held, allowing the appeal with costs:

(1) It is trite law that a claimant claiming damages must prove that he had suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he could recover the sum claimed. This followed from the general rule that the burden of proving a fact is upon him who alleged it and not upon him who denied it, so that where a particular allegation formed an essential part of a person's case, the proof of such allegation would fall on him. If he failed to prove both the liability and the quantum of damages, he would lose the action (see para 32).

(2) In a claim for damages, it would not be sufficient for the plaintiff to merely state the amount of damages claimed. He must prove the damage that he had in fact suffered to the satisfaction of the court. The burden rested on the plaintiff to prove the damages and it was not sufficient for the plaintiff to merely assert that he had suffered such damages without proving it. The High Court judge was right in ordering that summary judgment be entered on liability with damages to be assessed (see paras 33–34).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Rayuan dalam membenarkan rayuan responden (plaintif) terhadap keputusan Mahkamah Tinggi, memihak kepada perayu (defendan). Plaintif merupakan sebuah bank manakala defendan merupakan peguambela dan peguamcara dilantik oleh defendan untuk memulakan tindakan undang-undang untuk mendapatkan kembali jumlah tertunggak dari ODA Holdings (M) Development Corp Sdn Bhd (ODA). Defendan kemudian berjaya mendapatkan penghakiman ingkar pembelaan terhadap ODA di Mahkamah Tinggi. Lebih kurang sepuluh tahun selepas penghakiman diputuskan, plaintif mengarahkan defendan untuk mengenakan penghakiman terhadap ODA dan defendan seterusnya mengeluarkan notis tuntutan bayaran tetapi ODA tidak mengendahkan notis tuntutan tersebut, menyebabkan defendan untuk mengemukakan petisyen penggulungan (petisyen) terhadap plaintif. Dalam petisyen yang bertentangan, ODA berhujah bahawa plaintif menuntut untuk jumlah

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

tertunggak termasuk faedah tertunggak yang terakru melebihi enam tahun. Mahkamah Tinggi menerima bantahan dan menolak petisyen dengan kos. Plaintif kemudian mengarahkan defendan untuk menguatkuasakan semula prosiding penggulungan baru terhadap ODA tetapi defendan menasihatkan plaintif mereka tidak boleh mengeluarkan tuntutan statutori baru mahupun mengambil sebarang tindakan untuk menguatkuasakan penghakiman kerana ia telah terhalang oleh statut di bawah s 6(3) Akta Had Masa 1953. Di Mahkamah Tinggi, plaintif mendakwa defendan untuk kemungkiran terma, syarat dan jaminan pelantikan dan kecuaian mereka dalam melaksanakan perkhidmatan mereka. Plaintif memohon untuk memasuki penghakiman terhadap defendan menurut A 14 (permohonan A 14) Kaedah-Kaedah Mahkamah Tinggi 1980 (KMT). Timbalan pendaftar membenarkan permohonan A 14 dan memasukkan penghakiman akhir memandangkan tiada afidavit balas atau penghujahan oleh defendan. Defendan merayu terhadap keputusan timbalan pendaftar dan rayuan tersebut dibenarkan. Terkilan plaintif merayu terhadap keputusan Mahkamah Tinggi kepada Mahkamah Rayuan atas isu kuantum dan rayuannya dibenarkan. Maka, rayuan ini. Isu utama dalam rayuan ini sama ada penghakiman terus boleh dimasukkan bagi jumlah yang dipohon untuk penyata tuntutan dan sebagai mana diakui dalam afidavit sokongan tanpa perlu kepada apa-apa taksiran.

Diputuskan, membenarkan rayuan dengan kos:

(1) Ia adalah undang-undang lapuk bahawa penuntut yang menuntut ganti rugi hendaklah membuktikan bahawa dia telah mengalami kerugian. Penuntut mempunyai beban untuk membuktikan kedua-dua liabiliti dan kuantum ganti rugi, sebelum dia boleh menuntut jumlah tuntutan. Ini diikut daripada kaedah am bahawa beban membuktikan fakta adalah atas yang mendakwa dan bukan atas yang menafikan, supaya bila mana sesuatu dakwaan spesifik membentuk satu bahagian penting dalam kes seseorang itu, pembuktian atas dakwaan itu akan jatuh pada dirinya. Sekiranya dia gagal untuk membuktikan kedua-dua liabiliti dan kuantum ganti rugi, dia tidak boleh meneruskan tindakan (lihat perenggan 32).

(2) Dalam tuntutan untuk ganti rugi, ia adalah tidak mencukupi bagi plaintif untuk hanya menyatakan jumlah ganti rugi yang dituntut. Dia perlu membuktikan kerugian yang telah dialaminya sehingga mahkamah berpuas hati. Beban terletak atas plaintif untuk membuktikan ganti rugi dan ia adalah tidak mencukupi bagi plaintif untuk hanya menegaskan bahawa dia telah mengalami kerugian tersebut tanpa membuktikannya. Hakim Mahkamh Tinggi adalah betul dalam memerintahkan penghakiman untuk dimasukkan atas liabiliti dengan ganti rugi untuk ditaksir (lihat perenggan 33–34).]

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

Notes

For cases on banking, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8963–8970.

Cases referred to

Bolag v Hutchison [1905] AC 515, HL (refd)
Bonham-Carter v Hyde Park Hotel (1948) 64 TLR 177, KBD (refd)
Dummer v Brown and Another [1953] 1 QB 710, CA (refd)
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 (refd)
Tan Ah Chim & Sons Sdn Bhd lwn Lim Kean Siew dan lain-lain [2000] 6 MLJ 670, HC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)
Admiralty Comrs v SS Susquehanna [1926] AC 655, HL (refd)

Legislation referred to

Companies Act 1965 s 218
Evidence Act 1950 s 103
Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 14, O 14 r 1(2)

Appeal from: Civil Appeal No M-02(IM)-17 of 2009 (Court of Appeal, Putrajaya)

Ranjit Singh (CK Yeoh and Jamie Wong with him) (Ranjit Singh & Yeoh) for the appellants.
Goh Meng Yew (Iza Ng Yeoh & Kit) for the respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal dated 25 October 2011 which allowed the respondent's appeal against the decision of the High Court with costs. This court had on 17 April 2013 granted the appellants leave to appeal on the following question of law:

> Where, in a case where the claim is for unliquidated damages and/or general damages; and
>
> (i) plaintiff applies to enter summary judgment pursuant to O14 of the Rules of the High Court 1980, and
>
> (ii) liability is established or admitted by the defendant, and
>
> (iii) unascertained amount/damages is not a debt which is indisputably due

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

whether the court should only enter interlocutory judgment with such damages to be assessed?

[2] In this judgment, the appellants will be referred to collectively as the defendants and the respondent as the plaintiff, as they were in the High Court.

THE FACTS

[3] The plaintiff is a company duly incorporated in Malaysia under the Companies Act 1965 carrying on the business of a bank with its registered address at 27th Floor, Menara Public Bank, 146 Jalan Ampang, 50450 Kuala Lumpur.

[4] The first and second defendants were at all material times advocates and solicitors carrying on their practice in partnership under the name and style of Messrs Mohd Ali & Co.

[5] Sometime in May 1986, the plaintiff appointed the defendants to commence legal proceeding to recover outstanding amounts under the overdraft loan facility, fixed loan and trust receipt facility extended to ODA Holdings (M) Development Corp Sdn Bhd ('ODA') pursuant to the plaintiffs letters of offer dated 7 January 1985 and 26 February 1985, and against Ong Ah Sim @ Ong Swee Hoe and Abdullah bin Ahmad as guarantors for ODA under a letter of guarantee dated 8 March 1985.

[6] Pursuant to the instructions of the plaintiff, the defendants then instituted two legal proceedings against ODA and the guarantors vide Malacca High Court Civil Suit No 23–121 of 1986 ('the 121 suit') and Malacca High Court Civil Suit No 23–122 of 1986 ('the 122 suit').

[7] On 10 April 1987, the defendants obtained:

(a) judgment in default of defence against ODA and the guarantors in the 121 suit for, inter alia, the sum of RM614,690.07 together with interest at the rate of 16.25%pa till full payment ('the first judgment'); and

(b) judgment in default of defence against ODA and the guarantors in the 122 suit for, inter alia, the sum of RM248,375.60 together with interest at the rate of 14.5%pa till full payment ('the second judgment').

('referred as the judgments')

[8] Nearly ten years after the judgments were obtained, ie sometime in March 1998, the plaintiff vide letter dated 6 March 1998 instructed the

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

defendants to enforce the judgments against ODA. The letter also enclosed the statement of account with interest calculated up to 28 February 1998, the material part reads:

Statement of Account

M/s Oda Holdings (Malaysia) Development Sdn Bhd

Malacca High Court CS No 23-121-1986 - for Overdraft facility

Judgment Sum	614,690 - 07
Interest from 1-11-86 to 28-2-98	1,134,952-78
Less Payments	850,452-72
	899,190-13

Malacca High Court CS No 23-122-1986 - for Fixed Loan Facility

Judgment Sum	248,375-60
Interest from 1-11-86 to 28-2-98	323,9 70-67
Less Payments	332,182-08
	240,164-19

[9] The statement of account showed that the said amount included arrears of interest which had accrued on the judgments more than six years after 1 November 1986 (the date on which the interest became due as per court order dated 10 April 1987).

[10] The defendants then on 17 March 1998 issued against ODA:

(a) a notice pursuant to s 218 of the Companies Act 1965 dated 17 March 1998 demanding from ODA within 21 days of the date thereof the payment of RM899,190.13, being the amount outstanding under the first judgment inclusive of interest from 1 November 1986 till 28 February 1998 failing which a winding up petition would be presented against ODA ('the first s 218 notice'); and

(b) a notice pursuant to s 218 of the Companies Act 1965 dated 17 March 1998 demanding from ODA within 21 days of the date thereof the payment of RM240,164.19, being the amount outstanding under the second judgment inclusive of interest from 1 November 1986 till 28 February 1998, failing which a winding up petition would be presented against ODA ('the second s 218 notice').

[11] ODA ignored the notice of demand. Based on ODA's failure to make payment of the said amount of RM899,190.13 under the first judgment within the statutory period despite the first s 218 notice, the defendants then

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

presented a winding up petition against ODA vide Malacca High Court Winding Up Petition No 28–23 of 1998 ('the petition').

[12] ODA opposed the petition on the ground that the plaintiff had claimed for an outstanding amount under the first judgment which included arrears of interest accrued more than six years after 1 November 1986. On that premise, ODA contended that the first s 218 notice was bad in law and the petition ought to be dismissed.

[13] On 22 June 1999, the High Court accepted the aforesaid objection by ODA and dismissed the petition with costs.

[14] The plaintiff then instructed the defendants to recommence fresh winding up proceedings against ODA vide its letter dated 16 August 1999. The defendants then advised the plaintiff vide their letter dated 18 August 1999 that the plaintiff was unable to issue a fresh statutory demand pursuant to s 218 of the Companies Act 1965 against ODA nor take any action to enforce the judgment as the same was statute-barred under s 6(3) of the Limitation Act 1953.

[15] ODA's solicitors subsequently filed their bill of costs in respect of the decision dated 22 June 1999. On 19 January 2000, the registrar awarded the sum of RM23,254.08 as the taxed costs inclusive of allocator fees.

[16] On 10 April 2000, ODA's solicitors, accompanied by the court bailiff, went to the plaintiff's branch office at No 60–62, Jalan Laksamana, Melaka with a writ of seizure and sale to attach and seize the chattels of the plaintiff on the said premises. On 11 April 2000, the plaintiff paid to ODA's solicitors the total sum of RM24,695.64 inclusive of interest on the taxed sum and the costs of the writ of seizure and sale.

HIGH COURT

[17] On 13 January 2004, the plaintiff vide Malacca High Court Civil Suit No 2–22–8 of 2004 sued the defendants for breach of the terms, conditions and warranties of their appointment and negligence in the performance of their services. The plaintiff prayed for the following reliefs:

(a) damages of RM899,190.13 or in the alternative, damages to be assessed against the defendants;

(b) interest at the rate of 8%pa on the sum of the damages awarded under prayer (a) hereinabove from the date of the filing of this statement of claim till the date of full and final realisation;

(c) RM26,202.55;

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

(d) interest at the rate of 8%pa on RM26,202.55 from the date of the filing of this statement of claim till the date of full and final realisation;

(e) RM13,691.70 which was charged by the defendants as legal fees and which was paid to the defendants as such;

(f) interest at the rate of 8%pa on RM13,691.70 from the date of the filing of this statement of claim till the date of full and final realisation;

(g) costs of this action; and

(h) such further or other relief as this honourable court deems fit and proper to grant.

[18] Defence was filed on 13 April 2005.

[19] On 31 May 2005, the plaintiff applied for leave to enter summary judgment against the defendants pursuant to O 14 of the Rules of the High Court 1980 ('the RHC') ('the O 14 application').

[20] On 28 June 2006, the learned deputy registrar allowed the O 14 application and entered final judgment for the amount as prayed on the basis that there was no affidavit in reply filed by the defendants and no submission filed by learned counsel for the defendants.

[21] The defendants then appealed to the judge in chambers. On 27 November 2008, the learned judge allowed the defendants' appeal and set aside the order of the learned deputy registrar dated 28 June 2006. The learned judge ordered that damages payable by the defendants to the plaintiff be assessed. In allowing the defendants' appeal, the learned judge had this to say:

> Permohonan plaintif di bawah A 14
>
> *Kaedah-Kaedah Mahkamah 1980*
>
> Defendan-defendan tidak menjawab afidavit sokongan di bawah Permohonan Penghakiman Terus. Mengikut A 14 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 dan undang-undang matan (trite), defendan-defendan bertanggungjawab untuk menimbulkan isu atau isu-isu yang perlu dibicarakan. Kegagalan defendan-defendan memfailkan afidavit jawapan dan juga gagal memfailkan hujah bertulis menyebabkan Timbalan Pendaftar tiada pilihan selain daripada membenarkan permohonan plaintif untuk Penghakiman Terus.
>
> Isu seterusnya mengenai gantirugi. Tuntutan plaintif pada asasnya berdasarkan kepada kecuaian/negligence.
>
> Afidavit sokongan tersebut tidak memberi butir-butir terperinci secara spesifik bagaimana tuntutan plaintif RM899,190.13 diperolehi.
>
> Walaupun eksibit di bawah afidavit tersebut melampirkan statement of account, ianya dialamat kepada defendan untuk tuntutan terhadap ODA Holdings (M) Development Corp Sdn Bhd dan bukan tuntutan terhadap defendan sendiri.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

Statement of account tersebut tidak dinyatakan siapakah yang menyediakannya. Surat iringan ditandatangan oleh seorang bernama Chan Sow Leng, manakala afidavit sokongan (kandungan (24)) dibuat oleh seorang bernama Christopher Niap Tien Choy.

Atas alasan ini saya memutuskan gantirugi ini perlu ditaksirkan di hadapan Timbalan Pendaftar.

Gantirugi Kedua:

RM26,202.55 tiada keterangan bahawa jumlah ini sebenarnya telah dibayar oleh plaintif. Tiada afidavit atau resit bayaran dikemukakan.

Gantirugi Ketiga:

RM13,691.70 bayaran 'retainer' yang dibayar oleh plaintif kepada defendan. Sekali lagi tiada affidavit atau resit bayaran sebenarnya telah dibuat oleh plaintif kepada defendan.

Keduanya samada plaintif boleh menuntut kembali bayaran ini untuk perkhidmatan yang diberikan oleh defendan.

Saya bersetuju dengan hujah peguam defendan bahawa perkhidmatan telah diberi; dengan itu bayaran 'retainer' tidak boleh dituntut semula 'irrespective' kecuaian yang dikatakan berlaku. Gantirugi teladan tidak diplidkan.

Gantirugi perlu diplidkan secara specifik dan juga perlu dibuktikan secara spesifik. Plaintif tidak boleh 'lemparkan' kepada Mahkamah: ini kerugian saya dan saya minta mahkamah arahkan defendan bayar. Plaintif masih perlu buktikan kerugian tersebut.

Atas alasan-alasan di atas, saya membenarkan sebahagian rayuan iaitu kerugian perlu ditaksirkan oleh Timbalan Pendaftar.

COURT OF APPEAL

[22] Aggrieved, the plaintiff appealed against the decision of the High Court to the Court of Appeal. The appeal was only on the issue of quantum. On 25 October 2011, the Court of Appeal allowed the plaintiff's appeal and affirmed the decision of the learned deputy registrar.

[23] In allowing the plaintiff's appeal, Jeffrey Tan Kok Wha ('JCA'), as he then was, ruled as follows:

> But with respect to the learned judge, we fail to see how it could be held that the claim was not fully particularised, when the learned judge was able, to the contrary, to reproduce the particulars of the claim for RM899,190.13 in his grounds of judgment (see 133AR) from the particulars stated by the appellant at paragraph 19 of the affidavit in support at 200AR, which particulars were, in our opinion, clearly more than sufficient particulars of the claim for the said RM899,190.13.
>
> In relation to the claim ofRM26,202.55 that the appellant paid to ODA Holdings as legal costs and for the refund of RM13,691.70 that the Appellant paid to the Respondents as professional fees, the learned judge held that there was no evidence

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

that those legal costs and or professional fees had been paid (see 134AR). But again with respect to the learned judge, we fail to see how we could support that finding, for contrary to the finding of the learned judge the appellant had clearly affirmed that legal costs were paid to ODA Holdings (see para 29 of the affidavit in support at 207AR) and that professional fees were paid to the Respondents (see para 32(iv) of the affidavit in support at 218AR).

Suffice it to say that that we find all reasons of the learned judge to order assessment of damages could not be sustained. The quantum of loss of the Appellant was known and proved, by the judgment against ODA Holdings, by the quantum stated in the section 218 notices and by the unchallenged averments in the affidavit in support. We absolutely see no case for damages to be assessed.

For those reasons, we unanimously (i) allow this appeal with costs in the sum of RM10,000 to the appellant who would be entitled to a refund of the deposit, (ii) set aside the order of assessment of damages, and (iii) affirm the summary judgment as ordered by the learned senior assistant registrar.

THE PLAINTIFF'S SUBMISSIONS

[24] Learned counsel for the plaintiff submitted that the defendants in the present case failed to file any affidavit in reply to the plaintiff's application under O 14 of the RHC negating the plaintiff's allegation that the damage was caused by their negligence and breach of contract. He contended that this failure in essence meant that the defendants are deemed to have admitted such allegation. Therefore, there was no need for the plaintiff to prove nor to particularise the quantum of the damages payable by the defendants.

[25] Learned counsel for the plaintiff further contended that the defendants in the present case did not dispute the quantum of damages suffered by the plaintiff in the sum of RM899,190.13 as the defendants' statement of defence merely makes bare denial of the quantum of damages. He also submitted that in an O 14 application, the burden is on the defendant to show why judgment should not be entered and it is not for the plaintiff to prove the damage. On those grounds, he contended that the judgment was correctly entered by the learned deputy registrar.

[26] It is further submitted by learned counsel for the plaintiff that O 14 of the RHC does not make any distinction between a liquidated sum and an unliquidated sum. Instead, O 14 applies the same test for both types of claim. As long as the cause of action does not fall within O 14 r 1(2) (ie libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, or a claim based on an allegation of fraud), the plaintiff may apply for summary judgment under O 14 in its entirety and there is no requirement to assess the damages for 'unliquidated' claim.

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

A THE DEFENDANTS' SUBMISSIONS

[27] In reply, learned counsel for the defendants submitted that the defendants had never disputed the liability and for that reason they did not file any affidavit in reply. However, he submitted that damages must be assessed by the court. The plaintiff cannot merely rely on the judgment entered against ODA and claim the judgment sum against the defendants. The plaintiff must show to the court that but for the defendant's negligence, the plaintiff would have been able to recover the judgment sum or any part thereof.

[28] In the present case, the plaintiff must prove that at the material time the judgment debtor is solvent and has the means to satisfy the judgment sum. Learned counsel for the defendants argued that if the plaintiff is only able to show that the judgment debtor is only able to pay 50% of the judgment sum, then that is the amount of damages that the plaintiff is entitled to, and if the plaintiff fails to prove that the judgment debtor is able to satisfy the judgment sum or any part thereof, then the plaintiff is only entitled to nominal damages.

[29] Learned counsel for the defendants further submitted that the Court of Appeal fell into error in allowing final judgment for the sum claimed. He contended that the sum of RM899,190.13, though quantified by the plaintiff, is a claim in the nature of general damages. In the circumstances only an interlocutory judgment ought to have been entered with damages to be assessed, as ordered by the learned High Court judge.

F OUR FINDINGS

[30] The principal issue in this appeal is whether a summary judgment may be entered for the amount as prayed for in the statement of claim and as affirmed in the affidavit in support without the need for any assessment. The claim by the plaintiff in this case is for damages arising out of the defendants' breach of contract and/or negligence.

[31] The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered. The general principle governing the measure of damages has its origin in the words of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 where he said:

> that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

[32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him (see s 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.

[33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. This principle is borne out in the case of *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177 where Lord Goddard CJ observed:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

This statement was cited with approval by Edgar Joseph JR FCJ in *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777.

[34] The claim by the plaintiff in the present case is for general and special damages arising out of breach of contract and/or negligence. Therefore, the burden rests on the plaintiff to prove the damages and it is not sufficient for the plaintiff to merely assert that he had suffered such damages without proving it (see *Admiralty Comrs v SS Susquehanna* [1926] AC 655 and *Bolag v Hutchison* [1905] AC 515). In the circumstances, we hold that the learned High Court judge was right in ordering that summary judgment be entered on liability with damages to be assessed (see *Dummer v Brown and Another* [1953] 1 QB 710; *Tan Ah Chim & Sons Sdn Bhd lwn Lim Kean Siew dan lain-lain* [2000] 6 MLJ 670).

CONCLUSION

[35] For the above reasons, we would answer the question posed to us in the positive. Accordingly, the appeal is allowed with costs here and in the courts below. The order of the Court of Appeal is set aside and the order of the learned High Court judge is reinstated. The case is remitted to the High Court for assessment of damages.

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu Jul 24 13:47:19 2014

A *Appeal allowed with costs.*

Reported by Afiq Mohamad Noor

B

C

D

E

F

G

H

I